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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Ex Parte Presentation

Re: Petition for Administrative Sanctions of the State of Hawaii (MB Docket No. 03-82, IB Docket No. 98-21) (*DIRECTV Sanctions Proceeding*).

Dear Ms. Dortch:

On behalf of our client, the National Rural Telecommunications Cooperative, this is in reply to DIRECTV's recent Ex Parte Response in the above-captioned proceeding.¹ NRTC's position regarding many of these issues is already a matter of record with the Commission and need not be repeated here. However, NRTC does wish to respond briefly to some of DIRECTV's recent claims. For simplicity and brevity, DIRECTV's statements appear below in quotes. NRTC's comments follow.

"Contrary to the assertions of [Hawaii, NRTC and EchoStar], DIRECTV is in compliance with the Commission's DBS geographic service rules." (DIRECTV Response, p. 1).

False. As described below, DIRECTV is not now -- and never has been -- in compliance with the Commission's geographic service rules. The limited programming that DIRECTV offers to Hawaii is not remotely comparable to the programming offered to its CONUS subscribers.

"...the absence of the 22 programming channels at issue has not affected and should not be considered to affect DIRECTV's compliance with the Commission's geographic service rules." (DIRECTV Response, p.5).

False. DIRECTV's litigation decision to withhold the 22 core programming services from Hawaii obviously *does* affect DIRECTV's compliance with the Commission's geographic service requirements. Without the 22 core services, the State of Hawaii knows that DIRECTV's

¹ See Ex Parte Response of DIRECTV, Inc., *DIRECTV Sanctions Proceeding* (July 21, 2003) (*DIRECTV Response*).

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service to Hawaii is not comparable to its CONUS service;² Dish Hawaii knows that it is not comparable;³ EchoStar knows that it is not comparable;⁴ NRTC knows that it is not comparable;⁵ and upon review the Commission should know that it is not comparable.

“...DIRECTV currently provides fewer channels to Hawaii as compared to its CONUS subscribers...” (DIRECTV Response, p.1).

The problem is not that DIRECTV provides “fewer” channels to Hawaii; the problem is that DIRECTV provides a package of demonstrably *inferior* channels to Hawaii.⁶

“...DIRECTV is unable to provide identical service to the islands...” (DIRECTV Response, p. 2).

DIRECTV is *unwilling* -- not “unable” -- to provide core programming service to the islands.⁷ No one has argued that DIRECTV must provide “identical” service to Hawaii.

² See e.g. Petition for Administrative Sanctions of the State of Hawaii, *DIRECTV Sanctions Proceeding*, pp. 5 - 10 (February 6, 2003) (*Hawaii Petition*). For example, Hawaii notes that one of DIRECTV’s programming packages (Opcion Plus) is “targeted for the Spanish-language market, a language not widely spoken in Hawaii.” *Hawaii Petition*, p. 6. Hawaii also shows that DIRECTV’s program offerings excluded nine of the ten largest cable programming networks by subscribership (all of which are available to CONUS) and eight of the ten highest rated cable programming networks (also available to CONUS). *Id.* pp. 6 - 7. As a result, as one of DIRECTV’s own experts alluded, DIRECTV is depriving Hawaiian consumers of “almost all of this ‘must-have’ programming.” *Id.* p. 8.

³ See e.g. Comments of Dish Hawaii, *DIRECTV Sanctions Proceeding* (April 24, 2003) (*Dish Hawaii Comments*). Bill Barker of Dish Hawaii noted that “From the start DTV gave us a package that did not include the most popular basic channels like CNN, ESPN, A&E, Discovery, TNT, TBS, USA ESPN 2 and the national networks.” *Id.* p. 1. After informing prospective customers about DIRECTV’s program offerings, “99.999999 % of them say No Thanks.” *Id.* p. 2.

⁴ See Reply Comments of EchoStar Satellite Corporation, *DIRECTV Sanctions Proceeding*, pp. 2 - 5 (May 9, 2003) (*EchoStar Reply Comments*). EchoStar notes that DIRECTV’s Hawaii programming packages “do not include the same products offered in some of [DIRECTV’s] most popular programming packages available in [CONUS].” *EchoStar Reply Comments*, p. 1. EchoStar also notes that DIRECTV’s “imminent litigation” with NRTC is “hardly a case for economic unreasonableness.” *Id.* p. 5.

⁵ NRTC July 10 Presentation, *DIRECTV Sanctions Proceeding* (July 10, 2003) (*NRTC July 10 Presentation*). NRTC showed that many of the core programming services that DIRECTV denies to Hawaii are included in the Commission’s list of Top 20 programming services. *NRTC July 10 Presentation*, p. 2 - 5; Power Point Presentation, pp. 5 - 10.

⁶ See e.g. *Hawaii Petition*, pp. 5 - 10; *Hawaii Response*, pp. 3 - 5; Comments of the National Rural Telecommunications Cooperative, *DIRECTV Sanctions Proceeding*, pp. 5 - 9 (May 9, 2003); See also NRTC ex parte Presentation, *DIRECTV Sanctions Proceeding* (June 25, 2003); NRTC ex parte Presentation, *DIRECTV Sanctions Proceeding* (June 27, 2003); *NRTC July 10 Presentation*.

⁷ Since 1999, DIRECTV easily could have provided core programming to Hawaii through DIRECTV-1R but has chosen not to do for litigation reasons.

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“DIRECTV has developed specially tailored packages for Hawaiian residents.” (DIRECTV Response, p. 2).

True. For reasons related solely to its litigation against NRTC, DIRECTV has carefully tailored its service to Hawaii in order to avoid transmitting any core programming from DIRECTV 1R, the only full CONUS satellite capable of serving Hawaii from 101° WL.

“All of the programming that is carried on DIRECTV satellites technically capable of ‘seeing’ Hawaii is offered to Hawaiian customers...” (DIRECTV Response, pp. 2-3).

True, but the problem -- and the reason that Hawaii does not receive comparable service -- is that DIRECTV has chosen to keep the core programming *off* DIRECTV 1R, the only satellite with full CONUS distribution that is technically capable of seeing Hawaii from 101° WL.

“NRTC has no standing in this proceeding.” (DIRECTV Response, p.3).

False. NRTC, like any other interested party, fully satisfies any “standing” requirement and is free to submit comments in this proceeding pursuant to the Commission’s Public Notice.⁸ Moreover, NRTC did not initiate its entry into this proceeding -- DIRECTV did. In an ex parte filing three years ago, DIRECTV claimed that it was not providing a full complement of programming to Hawaii due to an undefined “NRTC limitation.”⁹ NRTC was entitled to and did take issue with DIRECTV’s attempt to portray NRTC as its scapegoat in this proceeding.

DIRECTV commits to provide Hawaii with at least 22 additional programming channels by the first Quarter of 2004. (DIRECTV Response, p.8).

DIRECTV’s “commitment” is too little, too late. DIRECTV could have provided this programming to Hawaii almost four years ago but chose not to do so for private litigation reasons.

“Hawaii criticized DIRECTV . . . because it believed that each of DIRECTV’s proposed options was ‘qualified excessively.’ This criticism is unwarranted.” (DIRECTV Response, p. 8).

⁸ Public Notice, Media Bureau Action, Request For Comment On Petitions Regarding DIRECTV’s DBS Service To The States Of Alaska And Hawaii, MB Docket No. 03-82 (released March 25, 2003).

⁹ Ex Parte Notice of DIRECTV, Inc., In the Matter of Application of DIRECTV Enterprises, Inc. For Authority to Launch and Operate a DBS Service Space Station, SAT-LOA-20000505-00086, p. 8 (June 30, 2000) (DIRECTV June 30, 2000 Ex Parte).

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DIRECTV offers only a list of conditions whereby Hawaii *might* receive additional programming: Hawaii *might* receive core programming over DIRECTV-1R, but only after the litigation with NRTC is resolved; Hawaii *could* receive additional programming over DIRECTV-7S, but only if the satellite is successfully launched; Hawaii *might* receive its core programming over additional satellite capacity, but only if DIRECTV acquires additional capacity.¹⁰

“The NRTC’s general evaluation of ...DIRECTV’s programming in Hawaii...(is) moot in any event...” (DIRECTV Response, p.4).

False. DIRECTV’s contingent promise to offer the 22 additional programming services to Hawaii does not render moot DIRECTV’s ongoing violation of the Commission’s geographic service rules or its repeated misrepresentations to the Commission regarding the real reason it has not provided the 22 programming services to Hawaii.

“There is absolutely no merit to the NRTC’s truly puzzling assertion ...that DIRECTV ‘has not been candid with the Commission’ regarding its level of service to Hawaii... DIRECTV has taken a consistent position...(DIRECTV Response, pp. 6-7).

Even a cursory review of the record in this proceeding shows that DIRECTV has been anything but candid regarding its provision of service to Hawaii.

DIRECTV claims that it has always made clear that it was forced to restrict its program offerings to Hawaii due to its litigation concerns with NRTC. On the public record, however, the extent of DIRECTV’s “candor” was limited to: 1) a few vague bullets in an ex parte presentation on June 30, 2000, regarding “litigation issues,” a “dispute with NRTC” and an “NRTC limitation;”¹¹ 2) a brief footnote in comments filed on July 17, 2000, about “ongoing litigation and certain programmer packaging agreements;”¹² and 3) a sentence or two at the end of an ex parte presentation on September 20, 2000, stating that DIRECTV has explained the circumstances surrounding its litigation and “sees no need to comment further.”¹³

¹⁰ DIRECTV Response, p. 8.

¹¹ DIRECTV June 30, 2000 Ex Parte, p. 8.

¹² Opposition and Reply Comments of DIRECTV Enterprises, Inc., *In the Matter of Application of DIRECTV Enterprises, Inc. For Authority to Launch and Operate a DBS Service Space Station, SAT-LOA-20000505-00086*, n. 17 (July 17, 2000).

¹³ Further ex parte Response of DIRECTV, Inc., *In the Matter of Application of DIRECTV Enterprises, Inc. For Authority to Launch and Operate a DBS Service Space Station, SAT-LOA-20000505-00086*, p. 2 (September 20, 2000).

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DIRECTV's cursory intimations of litigation three years ago pale in comparison to its repeated and detailed representations since then. For more than three years, DIRECTV said *nothing* about the litigation and instead claimed that it was prevented from providing core programming to Hawaii due to technical limitations, regulatory requirements, spectrum constraints, prohibitive costs, MVPD competitive concerns, conflicting public interest requirements and/or the law of physics.¹⁴ These were misleading excuses apparently proffered by DIRECTV because the Commission has never accepted private litigation strategies as a basis for failing to comply with its requirements. Not until April of 2003 did DIRECTV finally "come clean" and explain on the public record that its litigation strategy against NRTC was the real reason for its decision to deprive Hawaii of core programming for almost four years.¹⁵

"[The movement of] the DIRECTV 1 satellite to 101 WL...will allow DIRECTV to offer its new HD package to all U.S. subscribers, including consumers residing in Hawaii." (DIRECTV Response, p.9).

False. The movement of DIRECTV 1 from 110° WL to 101° WL has nothing to do with the provision of HD or any other services to Hawaii or anywhere else. It is a pure litigation tactic against NRTC.

"Mountain Satellite intends to open six stores at various Hawaii location...DIRECTV expects that this development will raise substantially DIRECTV's profile in Hawaii." (DIRECTV Response, p. 10).

Dish Hawaii, the other DIRECTV retailer in Hawaii, already has made clear to the Commission that without core programming, "99.9999999%" of consumers will not be interested in taking the product.¹⁶

"DIRECTV has engaged in a top-down review of the information on its website to remedy [identified] inaccuracies. In particular, DIRECTV is taking steps to ensure that the channel lineup for Hawaii programming packages listed on its website is accurate." (DIRECTV Response, p. 11).

A top-down review of DIRECTV's website is long overdue. But despite its review, DIRECTV still claims in its most recent letter that Hawaii already receives the Disney channel.¹⁷

¹⁴ See NRTC July 10 Presentation, and Attachment entitled "DIRECTV's Initial Representations To the Commission Regarding Service to Hawaii."

¹⁵ Opposition of DIRECTV, Inc., *DIRECTV Sanctions Proceeding*, pp. 13 - 15 (April 24, 2003).

¹⁶ *Dish Hawaii Comments*, p. 2.

¹⁷ *DIRECTV Response*, n. 13.

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Not according to its website. DIRECTV has had five months since the filing of Hawaii's Petition to fix its website and apparently still has failed to do so.

* * *

Your attention to this matter is appreciated. Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,

/s/ Jack Richards

Jack Richards

Attached: Certificate of Service

Certificate of Service

I HEREBY CERTIFY that on this 28th day of July, 2003, a true and correct copy of the foregoing ex parte presentation of the National Rural Telecommunications Cooperative, was submitted via electronic filing to the Federal Communications Commission, and, except where indicated, served via electronic mail upon the following:

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